U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE COMMANDANT
vs.	:	ON APPEAL
	:	NO. 2533
MERCHANT MARINER'S DOCUMENT NO. 077-52-3803-D1 Issued to: David ORTIZ	:	

This appeal from the denial of the Administrative Law Judge to reopen the hearing has been taken in accordance with 46 U.S.C. §7702 and 46 C.F.R. §5.601.

By a decision dated 12 February 1991, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's Merchant Mariner's Document, having found proved the charge of cocaine use.

The single specification supporting the finding of proved to the charge of drug use alleged that, on or about 6 July 1990, Appellant, while the holder of the above-captioned document, was tested by urinalysis and found to be a user of the drug cocaine.

The hearing was held at New York, New York on

25 January 1991. The Adminstrative Law Judge received into evidence from the Investigating Officer three exhibits and heard

the sworn testimony of three witnesses. Appellant appeared pro se and was advised of his rights, including the right to counsel or other representation and of the procedures to be followed at the hearing. Appellant entered a response of "deny" to the charge and specification as provided in 46 C.F.R. §5.527.

The Administrative Law Judge's written decision was entered on 12 February 1991. The decision and order was sent to Appellant, via certified mail, on 13 February 1991, to the address Appellant had provided to the Investigating Officer. It was unclaimed and subsequently returned to the Administrative Law Judge. In a further effort to advise Appellant, the Coast Guard sent a notification letter to Appellant's former address and also advised the Seafarer's International Union of the status of the decision and order. Appellant has not filed an appeal pursuant to the provisions of 46 C.F.R. Subpart J. Prior to this appeal of the denial of his petition to reopen the hearing, Appellant has not requested a transcript of the proceedings.

On 27 June 1991, Appellant filed a petition to reopen the hearing which was subsequently denied by the Administrative Law Judge on 26 July 1991. On 23 August 1991, Appellant filed his notice of appeal and brief with the Commandant. Accordingly, this appeal from the denial of the petition to reopen the hearing is properly before the Commandant for review.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned document, issued by the Coast Guard.

On 6 July 1990, Appellant appeared at the Seafarers International Union in Brooklyn, New York, to submit to a pre-employment urinalysis for drug testing purposes. Appellant provided a specimen which was properly collected, sealed and labeled in his presence. Appellant certified to the procedures on the Drug Testing Custody and Control Form. This Form was admitted as an exhibit at the hearing.

The specimen and documentation were forwarded to Nichols Institute, a certified laboratory for analysis. The urine specimen tested positive for cocaine metabolite. The urinalysis report and documentation were forwarded to Greystone Health Sciences Corporation, which is designated as the medical reviewing authority. Upon review of the case, and after the medical review officer had discussed the case with Appellant, a final determination was made that the positive test result was correct.

Counsel for Appellant: John T. McManus, Esq., Tracy A. Hass, Esq., Legal Aid Society, 20-11 Mott Avenue, Far Rockaway, NY 11691.

BASIS OF APPEAL

Appellant asserts the following basis of appeal from the decision of the Administrative Law Judge:

The Appellant's petition to reopen should have been granted on the basis of newly discovered evidence, or in the alternative, on the basis of Appellant's lack of attorney representation at the hearing.

OPINION

Appellant asserts that the Administrative Law Judge erred in not granting his petition to reopen the case. Appellant urges that, contrary to the finding of the Administrative Law Judge, Appellant produced new evidence that was not capable of being produced at the hearing. I do not agree.

Title 46 C.F.R. §5.603 sets forth detailed requirements for reopening a hearing on the basis of newly discovered evidence. The basic requirements are that Appellant fully describe the newly discovered evidence and provide an explanation why he, "[w]ith due dilligence, could not have discovered such new evidence prior to the completion of the hearing." 46 C.F.R. §5.603(a).

In this case, Appellant contends that the Drug Testing Custody and Control Form, admitted at the hearing as one of three Investigating Officer Exhibits (I.O. Exhibit 1), constitutes newly discovered evidence. Appellant comes to this conclusion on the basis that he only recently, with the aid of counsel, recognized that on "step 6" of I.O. Exhibit 1 the word "error" was annotated above the block where a positive result was checked.

I do not agree that this recent realization constitutes newly discovered evidence within the meaning of the regulation. The Decision and Order of the Administrative Law Judge reflects that I.O. Exhibit 1 was reviewed at the hearing and admitted into evidence. [Decision and Order at 6]. Notwithstanding that

Appellant appeared at the hearing pro se, there is no indication that he did not have a full opportunity to review the evidence and raise questions regarding I.O. Exhibit 1.

The Investigating Officer's comments, dated 12 July 1991, reflect that the annotation on I.O. Exhibit 1 was confirmed as an administrative error.

Appellant's assertion that he was prejudiced because his waiver of the right to counsel was not made knowingly and intelligently is misplaced. Such an issue is not appropriately raised on an appeal from a denial of a petition to reopen. This review is strictly limited to a determination regarding the specific issue of newly discovered evidence or the inability of Appellant to make a personal appearance at the hearing. Appeal Decisions 1634 (RIVERA); 2238 (MONTGOMERY), reversed on other grounds by NTSB Order EM-87 (1981); 2240 (PALMER).

I do not concur with Appellant's contention that his pro se appearance equates with an "inability to appear at the hearing" within the meaning of 46 C.F.R. §5.601(a). The plain language of that provision refers exclusively to the physical inability to appear and does not refer to pro se representation. See, Decisions on Appeal 2256 (MONTANEZ); 2484 (VETTER).

Since in this case, Appellant has failed to establish the prerequisite existence of newly discovered evidence, and since Appellant did in fact personally appear at the hearing, there is no basis to reopen the hearing. Accordingly, the decision of the Administrative Law Judge will not be disturbed.

Appellant requests, inter alia, a copy of the transcript of the proceedings and a waiver of the fees for the reproduction costs based on Appellant's indigent status. Appellant states he requests the transcript to "assist in preparing this appeal." Appellant's indigency is verified by the Legal Aid Society of New York, which is representing Appellant without a fee. The Legal Aid Society attests that Appellant is "currently receiving public assistance as his sole source of income." [Appellant Petition to Reopen dated 27 June 1991].

Based on Appellant's apparent indigent status, Appellant's request will be granted. The Investigating Officer is directed to prepare a transcript of the proceedings and serve a copy upon Appellant's counsel, unless otherwise directed in writing by Appellant.

This decision, addressing Appellant's petition to reopen, will not be delayed pending preparation of the requested transcript since the critical issue of newly discovered evidence can be cogently determined without resorting to review of the transcript.

CONCLUSION

The Administrative Law Judge's denial of Appellant's petition to reopen the hearing is neither arbitrary nor capricious and is properly based on the prerequisites of 46 C.F.R. Subpart I. There is no substantial proof of newly discovered evidence that would justify the hearing to be reopened.

ORDER

The Decision of the Administrative Law Judge dated 26 July 1991 is AFFIRMED.

//SS// MARTIN H. DANIELL
MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 3rd day of December, 1991.